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No. _____

In The

***SUPREME COURT OF THE UNITED STATES***

October Term, 1994

AREA BELLE CHASSE COMMUNITY RADIO,

*Petitioner,*

v.

BELLE CHASSE BROADCASTING CORPORATION, ET AL,

*Respondents.*

---

**On Writ of Certiorari to the Louisiana Supreme Court**

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# PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

1. Can the Courts of the State of Louisiana interpret the phrase "public affairs programming" in a fashion inconsistent with pronouncements on the matter issued by this Court and the Federal Communications Commission?

2. Can the Courts of the State of Louisiana interpret the phrase "public affairs programming" in a discriminatory fashion which favors some organizations and viewpoints and repudiates other organizations and viewpoints?

## PARTIES TO THE PROCEEDING

Parties to the proceedings in the Louisiana Supreme Court and the Court of Appeal for the Fifth Circuit of the State of Louisiana were the petitioner Area Belle Chase Community Radio and the Respondent(s) Coastal Broadcasting, Inc. and its predecessor entities First Belle Chasse Media Group, a partnership in commendam, and Belle Chasse Broadcasting Corporation, a corporation.

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A. In general review should be granted because how the nation's courts interpret the phrase "public affairs programming" will affect the form and content of public debate over the nations airwaves, ultimately affecting the form and content of the nation's democracy. . . 10

B. In particular, review should be granted because Louisiana has interpreted the phrase" public affairs programming" in a fashion inconsistent with FCC pronouncements on the matter. This error merits review given that it violates the Supremacy Clause of the U.S. Constitution, and significantly and adversely

affects the public interest by confusing and restricting what station owners might broadcast as public interest programming; and by confusing terms which otherwise might lead to settlements in FCC comparative hearings.. . . . . 11

C. In particular, Review should be granted because Louisiana has interpreted the phrase "public affairs programming" in a discriminatory and content based fashion. This error merits review given that it violates the First and Fourteenth Amendments to the U.S. Constitution, and significantly and adversely affects the public interest by confusing what might be broadcast as public interest programming, and by favoring some unions and organizations over others, and by promoting certain viewpoints (e.g., segregation) and condemning others (e.g., housing actions). . . . . 16

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IN THE
SUPREME COURT OF THE UNITED STATES
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AREA BELLE CHASSE COMMUNITY RADIO,

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v.

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Respondents

---

**Petition for a Writ of Certiorari to the Louisiana Supreme Court**

---

## PETITION FOR A WRIT OF CERTIORARI

The petitioner Area Belle Chasse Community Radio respectfully prays that a writ of certiorari issue to review the decision of the Louisiana Supreme Court entered in the above entitled proceeding November 11, 1994.

## OPINIONS BELOW

By a vote of 5 to 2 the Louisiana Supreme Court denied Area Belle Chasse Community Radio's application for a writ of certiorari and/or Review to the Louisiana Court of Appeal, Fifth Circuit. The denial is reprinted in the Appendix herein at App. 1a.

The opinion of the Louisiana Court of Appeal for the State of Louisiana was not designated for publication, and is reprinted in the Appendix herein at App 3a.

On information and belief the opinion of the trial court has not been reported, and is reprinted in the Appendix herein at App 10a.

## JURISDICTION

Jurisdiction of the Court is invoked pursuant to 28 USC 1257(a) because petitioner Area Belle Chasse Community Radio claims certain rights and privileges under the Constitution of the United States which have been violated by decisions of the Louisiana Courts.

## CONSTITUTIONAL PROVISIONS

Article Six, Section Two of United States Constitution provides: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof ... shall be the

supreme Law of the Land; and the Judges in every State shall be bound thereby, and Thing in the Constitution or Law of any State to the Contrary notwithstanding."

The First Amendment to the United States Constitution provides: "Congress shall made no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and petition the Government for a redress of grievances."

The Fourteenth Amendment to the United States Constitution provides: "...No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; or deny any person within its jurisdiction the equal protection of the laws."

## STATEMENT OF THE CASE

In 1987 a number of parties filed competing applications for a Construction Permit for a Commercial Broadcast Station on radio frequency serving an area near New Orleans, Louisiana. Two of the parties included petitioner Area Belle Chase Community Radio ("ABC") and Respondent Coastal Broadcasting, Inc. ("Coastal").[1]

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[1]. In actuality, through various of the FCC proceedings Coastal participated not only under its own name, but also through predecessor entities (First Belle Chasse Media Group, a partnership in commendam, and Belle Chasse Broadcasting Corporation, a corporation). However, all entities will be referred to as "Coastal" because Coastal assumed their rights and responsibilities.

The application of Coastal recited a "Program Service Statement" which promised that all its programming concerning issues of public importance would abide by the Fairness Doctrine.

Soon after Coastal's filing the FCC found that "...the fairness doctrine, on its face, violates the First Amendment and contravenes the public interest." *Syracuse Peace Council*, 2 FCCRcd 5043 (1987).

ABC was a not-for-profit corporation initially financed through tax exempt grants. ABC's "Program Service Statement" stated that its programming would focus on concerns of the low and moderate income community; it would involve the listenership directly, do direct reporting from neighborhood meetings and actions, and include shows directly run by one or another of the groups served, including labor unions and community groups.

Subject to FCC approval (which was eventually granted), Coastal in 1989 negotiated a settlement between Coastal and its competitors. Coastal received the license. Three competitors received sums of $63,000, $40,000 and $150,000.

ABC received $25,000 from Coastal. Additionally, though, the parties agreed that Coastal would broadcast one and one half hours weekly of 'public affairs programming' produced by ABC...." The settlement contract stated that Coastal reserved the right to refuse, in its sole discretion, to broadcast any portion of that programming which violates any rule or regulation of the FCC or other law or its public interest obligations as a licensee. Pursuant to 47 C.F.R. 73.658(e) and *Deborah A. Lehman and Donald R. Ricketts,* 66 FCC2d 1061,

1062 (1977), the parties stipulated that "Where a FCC license *reasonably* determines that programming supplied by an outside source is inconsistent with the public interest, it has not only a right--but an obligation--to refuse to air such programming" [emphasis added].

In August 1990 ABC provided tapes of programming to Coastal entitled "Winds of Change", whose transcript indicated the following coverage:

--Congressman Joe Kennedy (pp. 1-2)
--an ACORN convention (pp. 2-11)
--Local 100 union organizing (pp. 11-15)
--Hotel Employees and Restaurant Employees union organizing (pp. 15-16)
--Greyhound strike by Local 1600, Amalgamated Transit Workers Union (pp. 16-19, 22-25)
--environmental legislation passed in Jay, Maine through the efforts of the International Paperworkers Union (pp. 19-21)
--homelessness (p. 25)
--ACORN actions concerning housing, including a segment from ABC Nightly News covering ACORN members squatting (pp. 26-29)

In the "Winds of Change" the Local 100 phone number was given out once, and the Local 1600 phone number was given out once, and beyond that no telephone numbers were read.

Coastal refused to broadcast ABC's "Winds of Change" on the grounds that it was not public affairs programming and rejected it. Objections were raised to the references to squatting, and the Local 100, Local 1600 and ACORN [sic] phone numbers, even though Coastal's principal stated that the

reportage did not inspire him to squat, and did not inspire him to join ACORN, Local 100, or Local 1600.

In programing which Coastal subsequently characterized and broadcast as public service programming, Coastal included solicitations to the public concerning a number of organizations, along with their phone numbers. Some read as follows:

> The Belle Chasse Civic Association is growing strong, and you're invited to join...The Belle Chasse Civic Association meets every fourth Tuesday of the Month at 7:30 p.m...Meetings are held at the Belle Chasse Public Library...If you're interested in joining this vital community organization, call Nancy at 394-5188...The Belle Civic Association...Bringing Belle Chasse together...
>
> Part of the magic of New Orleans is the way we help others... The Jefferson Parish Fire Fighters, Local #1374 are sponsoring a fishing Rodeo on Saturday, May 4th at Lafreniere Park. All proceeds will benefit the Muscular Dystrophy Association. Fishing gets underway at 6 am. For more info, call us at 260-WLMG...Magic 102. 734-0407/830-5752.
>
> Part of the magic of New Orleans is the way we help others...Saint Paul's school presents the original jazz 'n roll party this Sunday, October 13th at the Abita Quail Farm in Covington. Pete Fountain will be the special guest. For more info, call us at 260-WLMG...Magic 102. 3pm - 8pm $40,00 donation... Dan Denny at

529-6213.

**Actions of the Trial Court**

In 1990 ABC filed suit against Coastal in Orleans Parish. In 1991 the case was removed to Jefferson Parish. The trial began in August 1992 and concluded in February 1993. In its trial brief ABC pointed out that the definition of public affairs programming was a matter controlled by federal law:

> In an FCC context the term "public affairs programming" must be understood to mean what it has meant in FCC contexts. Over the years the FCC and the Supreme Court have elaborated on the meaning of the term "public affairs programming". Contrary to the assertions of Coastal, the definition of "public interest" and public affairs is not some will-o-the-wisp to be defined according the subjective whims of some supposedly "experienced" group of broadcasters. [footnote deleted] The Supreme Court disposed of this notion in *NBC v. US*, 319 US 190, 225 (1943) when it held that "public interest" was not unconstitutionally vague. The FCC "perforce has the power--and in fact the responsibility--to define the licensees' public interest obligations with respect to programming." *United Church of Christ v. FCC*, 707 F.2d 1413, 1428 (D.C.Cir., 1983). The FCC accordingly has at a number of junctures specified the meaning of "public interest" and "public affairs"....

Citing no statutes or case law, the trial court on September 10, 1993, issued a REASONS FOR JUDGMENT holding that Area Belle Chasse breached the contract in that it

failed to submit public affairs programming.

**Actions of the Louisiana Appeal Court**

In 1993 ABC appealed the trial court decision to the Louisiana Court of Appeal for the Fifth Circuit of the State of Louisiana. In its brief ABC counsel designated seven issues for review, three of which read as follows:

> ISSUE TWO. Whether the trial court erred by holding that Louisiana contract law interprets "public affairs programming" in a fashion inconsistent with FCC pronouncements on the matter. U.S.Const. Art.6, sec.2.
>
> ISSUE THREE. Whether the trial court erred by holding that Louisiana contract law interprets "public affairs programming" in a fashion inconsistent with the First Amendment to the U.S. Constitution in that its interpretation is content based. U.S.Const.Amend 1.
>
> ISSUE FOUR. Whether the trial court erred by holding that Louisiana contract law interprets "public affairs programming" in a fashion inconsistent with the Fourteenth Amendments to the U.S. Constitution in that it protects and promotes certain points of view over others. U.S.Const.Amend 14.

On June 28, 1994, the appeal court affirmed the trial court's decision that ABC's "Winds of Change" program was not "public affairs programming." In a footnote it stated that no constitutional issues were involved because the contract gave

discretion to Coastal to determine what was public affairs programming; but it did not address ABC's point that Coastal's discretion was contained by FCC requirements that such characterizations be reasonable.

**Actions of the Louisiana Supreme Court**

In 1994 ABC applied for a writ of certiorari to the Supreme Court of Louisiana. In its brief ABC counsel designated four assignment of errors, the first two of which read as follows:

> FIRST ERROR. The appeal court erred in holding that Louisiana law interprets the phrase "public affairs programming" in a fashion inconsistent with FCC pronouncements on the matter. This error merits review given that it violates the Supremacy Clause of the U.S. Constitution, causes material injustice, and significantly and adversely affects the public interest by confusing and restricting what station owners might broadcast as public interest programming.
>
> SECOND ERROR. The appeal court erred in holding that Louisiana law interprets the phrase "public affairs programming" in a discriminatory and content based fashion. This error merits review given that it violates the First and Fourteenth Amendments to the U.S. Constitution, causes material injustice, and significantly and adversely affects the public interest by confusing what might be broadcast as public interest programming, and by favoring some unions and organizations over others, and by promoting certain viewpoints (e.g., segregation) and condemning others

(e.g., housing actions).

On November 11, 1994, by a vote of 5 to 2, the Louisiana Supreme Court denied Area Belle Chase Community Radio's application for a writ of certiorari and/or Review to the Louisiana Court of Appeal, Fifth Circuit.

## REASONS FOR GRANTING THE WRIT

### A. In general review should be granted because how the nation's courts interpret the phrase "public affairs programming" will affect the form and content of public debate over the nations airwaves, ultimately affecting the form and content of the nation's democracy.

The instant petition for writ of certiorari should be granted because in general it fits the "special and important reasons" criterion set out in U.S. Supreme Court Rule 10.1. This case concerns the interpretation of the term "public affairs programming" by nation's courts. That general issue is "special and important" because the meaning of "public affairs programming" will determine the sort of programming which station owners will broadcast to Louisiana and United States citizens. What station owners broadcast to fulfill their "public affairs programming" responsibilities will in part be affected by how they anticipate the courts will define that term. And thus how the courts interpret "public affairs programming" will affect the debates which inform and create the democracy which the Louisiana and the United States are trying to maintain and develop.

**B. In particular, review should be granted because Louisiana has interpreted the phrase "public affairs programming" in a fashion inconsistent with FCC pronouncements on the matter. This error merits review given that it violates the Supremacy Clause of the U.S. Constitution, and significantly and adversely affects the public interest by confusing and restricting what station owners might broadcast as public interest programming; and by confusing terms which otherwise might lead to settlements in FCC comparative hearings.**

More particularly, the instant petition for writ of certiorari should be granted because in it fulfills the criteria set out in U.S. Supreme Court Rule 10.1(c):

> When a state court ... has decided an important question of federal law which has not been, but should be, settled by this court, or has decided a federal question in a way that conflicts with applicable decisions of this court.

Because of the importance of the fundamental democratic issues underlying the meaning of public affairs programming, the courts and the FCC have spent some 50 years attempting to explicate its parameters. In violation of the U.S. Constitution's Supremacy Clause the Louisiana courts have ignored and repudiated those explication. In so doing the Louisiana courts have confused and restricted what station owners might broadcast as public interest programming.

In an FCC context the term "public affairs

programming" must be understood to mean what the federal courts and relevant federal agency (the FCC) have determined it to mean. Over 50 years ago the U.S. Supreme Court held that "public interest" was not an unconstitutionally vague term. *NBC v. US*, 319 US 190, 225 (1943). The FCC "perforce has the power--and in fact the responsibility--to define the licensees' public interest obligations with respect to programming." *United Church of Christ v. FCC*, 707 F.2d 1413, 1428 (D.C.Cir.,1983).

Accordingly the FCC has at a number of junctures specified the meaning of "public interest" and "public affairs":

In 1960 it elucidated the terms in terms of whether licensees afforded "reasonable opportunity for the discussion of conflicting views on issues of public importance," *Enbanc Programming Inquiry* 44 FCC 2303, 2311 (1960). Among the "major elements" considered "usually necessary to meet the public interest" the FCC cited "opportunity for local self-expression, educational programs, public affairs programs, editorialization by licensees, political programs, and service to minority groups. *Ibid.*, 2314.

In 1980 it stated that "Public affairs programs are defined as 'programs dealing with local, state, regional, national or international issues or problems, including but *not limited to*, talks, commentaries, discussions, speeches, editorials, political programs, documentaries, mini-documentaries, panels, roundtables, vignettes, and extended coverage (whether live or recorded) of public events or proceedings..." *Community Service Programming Category*, 82 FCC2d 130, 150 (1982). See also 47 CFR 73.1810(d)(1)(iv) (1983).

In 1981 the FCC remarked that "public interest" programming could include, "by way of example and not limitation, public affairs, public service announcements, editorials, free speech messages, community bulletin boards, and religious programming." *Deregulation of Radio*, 84 FCC2d 968, 982-983 (1984).

The preceding approach embraces the notion of an "uninhibited marketplace of ideas" where "Truth and "Falsehood" are expected to "grapple ... in a free and open encounter ...For who knows not that Truth is strong, next to the Almighty?" *Red Lion Broadcasting Co. v. FCC*, 395 US 367, 390 (1968); J. Milton, *Areopagitica*, in *THE PORTABLE MILTON*, 199 (D.Bush ed. 1967). It was this vision which led the FCC to repudiate the Fairness Doctrine because of its chilling effect, because it impeded the broadcast of "controversial issues," and because it inhibited "the expression of unpopular opinion." *Syracuse Peace Council*, 2 FCCRcd 5043 (1987). See also *FCC v. League of Women Voters*, 468 US 364, 377 (1983).

From the preceding it should be clear that the programming submitted by ABC fit under the definitions of public affairs programming as outlined by the U.S. Supreme Court and the FCC. "Winds of Change" included local self-expression, political programs, service to minority groups, discussions, speeches, documentaries, mini-documentaries, vignettes, extended coverage of public events, free speech messages, controversial issues, and the expression of unpopular opinion--all of which would qualify under FCC definitions of public affairs programming. *Syracuse Peace Council*, 2 FCCRcd at 5043; *Deregulation of Radio*, 84 FCC2d at 982-983; *Community Service Programming Category*, 82 FCC2d at 150 (1982); 47 CFR 73.1810(d)(1)(iv) (1983); *Enbanc*

*Programming Inquiry* 44 FCC at 2314.

From the preceding it should be equally clear how noxious the decisions of the Louisiana courts are when they hold the contrary. To justify its decision that ABC had not provided Coastal with "public affairs programming" the Louisiana courts claimed that "it is the element of solicitation contained in "Winds of Change" that is outside the realm of public affairs programming." 8a [2] Such a statement, though, suggests that the Louisiana court simply ignored the FCC pronouncements it cited. In *Deregulation of Radio,* 84 FCC2d 968, 982-983 (1984) the FCC stated that public affairs programming could include public service announcements, community bulletin boards, and religious programming, all of which contain elements of solicitation. In 1985, the FCC criticized the fairness doctrine's effects in suppressing public issue advertisements and "racy" evangelism, which also contain elements of solicitation. *1985 Fairness Report*, 102 FCC2d

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[2]. The appeal court went on to assert that Coastal had "broad latitude" to unilaterally determine what was "public affairs programming"; and, given that the "Winds of Change" program supposedly "encouraged the [illegal] practice of squatting, it was appropriate for Coastal to determine that "Winds of Change" was not "public affairs programming". 8a But it did not acknowledge that the FCC contains Coastal's discretion with a reasonability requirement. See 47 C.F.R. 73.658(e); *Deborah A. Lehman and Donald R. Ricketts*, 66 FCC2d 106. Nor did it acknowledge that the FCC encourages the articulation of abhorrent, extreme and illegal materials, as well as support for illegal segregation. *Community Service Programming Category*, 82 FCC2d 130, 150 (1982). See also 47 CFR 73.1810(d)(1)(iv) (1983); *Deregulation of Radio*, 84 FCC2d 968, 982-983 (1984); *1985 Fairness Report*, 102 FCC2d 143, 147, 148, 246 (1985); *Syracuse Peace Council*, 2 FCCRcd 5043 (1987). *1985 Fairness Report*, 102 FCC2d at 143, 188-190.

143, 147-48, 177, 189n.169, 246 (1985). When the FCC ultimately repudiated the fairness doctrine, it did so in a case where a nuclear power company was claiming that one of its power plants constituted a "sound investment for New York's future." *Meredith Corp. v FCC* 809 F.2d 863, 865-866 (D.C., 1987); *Syracuse Peace Council*, 2 FCCRcd 5043 (1987). In the end the Louisiana courts missed the whole point of the FCC's public affairs programming pronouncements, which acknowledge the elementary and fundamental First Amendment proposition that every idea is an "incitement." *Gitlow v. New York*, 268 US 652 at 673 (1925).

Thus when the Louisiana courts held that ABC's program was not public affairs programing it ran directly contrary to years of FCC pronouncements concerning the matters; not to mention common sense and what the parties--including Coastal--actually practiced.[3]

The error is not trivial, and requires review by this court. The Louisiana court's error abrogates over 50 years of federal elaboration of the meaning of public affairs and public interest. As a matter of law such does not accord the deference to which federal agencies are due in their areas of expertise. *US v. Shimer*, 367 US 374 (1961); *Tacoma v. Taxpayers of Tacoma*, 357 US 310 (1958); *McCulloch v. Maryland*, 17 US 316

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[3]. On these "solicitation" matters the appeal court was wrong not only as a matter of law, but also as a matter of fact. As a matter of fact, Coastal itself denied that "Winds of Change" had any solicitation impact. Whatever Coastal thought about the solicitation elements in ABC's programming, when Coastal provided the court with its own examples of what Coastal ran as public affairs programming, they were rife with explicit solicitations.

(1819). See also *Chevron v NRDC*, 467 US 267 (1974). As a matter of public interest such threatens to contain if not destroy the "uninhibited marketplace of ideas" which the FCC is trying to cultivate, where the public can receive and express "ideas and experiences". *FCC v. League of Women Voters,* 468 US 364, 377 (1983). If this matter is not clarified and resolved by this court, station owners will not know what sort of programming will fulfill their "public affairs programming" responsibilities; and the quality of public information and debate is likely to suffer. Finally, if this matter is not clarified and resolved by this court, settlements prospects in comparative hearings before the FCC are likely to be undercut, because parties who might otherwise negotiate would be reluctant to sign contacts where state courts might take ostensibly settled terms and impose an interpretation on them outside established precedent.

> **In particular, Review should be granted because Louisiana has interpreted the phrase "public affairs programming" in a discriminatory and content based fashion. This error merits review given that it violates the First and Fourteenth Amendments to the U.S. Constitution, and significantly and adversely affects the public interest by confusing what might be broadcast as public interest programming, and by favoring some unions and organizations over others, and by promoting certain viewpoints (e.g., segregation) and condemning others (e.g., housing actions).**

That the Louisiana Courts have failed to properly explicate the meaning of public affairs programing is underlined by the second manner in which they have rendered decisions in conflict with applicable decisions of this court. They have

interpreted "public affairs programming" in fashion that makes it content based, discriminating in favor of certain viewpoints and organizations against other viewpoints and organizations, in violation of the First and Fourteenth Amendments to the U.S. Constitution.

It constitutes elementary jurisprudence to note that a court in interpreting a phrase must ensure that it remains consistent with the First Amendment. *New York Times v. Sullivan*, 376 US 254 *(1964); Shuttlesworth v. Birmingham, 394 US 147 (1969); Shelley v. Kraemer, 334 US 1 (1948);* C. Sunnstein, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* (1993) 38-41. In this case the Louisiana court interpreted "public affairs programming" so as to transform it into an unconstitutional content-based term. Under the Louisiana courts' interpretation some local self-expression is allowed, but not that contained in ABC programming. Under the Louisiana courts' interpretation some speeches, documentaries, mini-documentaries, extended coverage of public events, and free speech messages are allowed, but not those contained in ABC programming. Under the Louisiana courts' interpretation religious cults can be discussed, but not ACORN. Under the Louisiana courts' interpretation public employee wage disputes can be covered, but not those involving Local 100, SEIU, and Local 1600, ATWU. Under the Louisiana courts' interpretation events sponsored by the Jefferson Parish Fire Fighters Local #1374 can be promoted, but not those involving Local 100, SEIU, and Local 1600, ATWU. Under the Louisiana courts' interpretation certain squatting issues covered by "Winds of Change" fall outside of "public affairs" issues, while the "public affairs" status of racially segregationist viewpoints remains. Under the Louisiana courts' interpretation some community organizations (including Local #1374) get their names and phone number announced over the

radio, while certain unions (and community organizations) do not. Such selective and discriminatory content-based discrimination is, of course, unconstitutional. *Police Dept. of Chicago v. Mosley,* 408 US 92 (1972).

This error too is not trivial, and this error also requires review by this court. As a matter of general public interest the amendments to the U.S. Constitution must be respected. More particularly, in this democracy government cannot and should not go into the business of supporting certain viewpoints and organizations while suppressing others.

Additionally, if this matter is not clarified and resolved by this court, station owners will not know what sort of programming will fulfill their "public affairs programming" responsibilities; and the quality of public information and debate is likely to suffer.

## CONCLUSION

For the foregoing reasons, petitioner respectfully requests that the Court grant the petition for a writ of certiorari to the Louisiana Supreme Court.

Respectfully submitted,

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**APPENDIX**

**THE SUPREME COURT OF THE STATE OF LOUISIANA**

**AREA BELLE CHASSE COMMUNITY RADIO**

**VS.** **NO. 94-C-2026**

**BELLE CHASSE BROADCASTING CORPORATION, ET AL**

- - - - -

IN RE: Area Belle Chasse Comm. Radio; - Plaintiff(s); Applying for Write of Certiorari and/or Review; to the Court of Appeal, FIfth Circuit, Number 94-CA-0138; Parish of Jefferson Twenty-Fourth Judicial District Court Div. "K" Number 421-952.

- - - - -

November 11, 1994

Denied.

HTL

JLD

JCW

PH

CDK

CALOGERO, C.J. would grant the writ.

MARCUS, J. not on panel.

JOHNSON, J. would grant the writ.

Supreme Court of Louisiana
November 11, 1994

_____
Clerk of Court for the Court

**NOT DESIGNATED FOR PUBLICATION**

| | | |
|---|---|---|
| **AREA BELLE CHASSE COMMUNITY RADIO** | * | **NO. 94-CA-138** |
| | * | **COURT OF APPEAL** |
| **VERSUS** | | |
| | * | **FIFTH CIRCUIT** |
| **BELLE CHASSE BROADCASTING CORPORATION, ET AL** | * | **STATE OF LOUISIANA** |

**APPEAL FROM THE TWENTY-FOURTH JUDICIAL DISTRICT COURT**
**PARISH OF JEFFERSON, STATE OF LOUISIANA**
**DOCKET NO. 421-952, DIVISION "K"**
**HONORABLE MARTHA E. SASSONE, JUDGE**

**CHARLES GRISBAUM, JR.**

**JUDGE**

**JUNE 28, 1994**

**(Court composed of Judges Thomas J. Kliebert, Charles Grisbaum, Jr., and James L. Cannella)**

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**AFFIRMED**

The central issue presented in this civil appeal is whether there was a breach of contract between the parties. The trial court found no such beach: thus Area Belle CHasse Community Radio (ABC) appeals. WE affirm.

The basic record facts and procedural history are well-known to all parties. Accordingly, they will not be repeated.

Although several issues have been presented in brief by appellant, these issues can be summarized in basically one phrasing, namely, whether the trial court erred in deciding "Winds of Change" was not public affairs programming.

ANALYSIS

The Law

The contract between parties is the law between them, and the courts are obligated to give legal effect to such contracts according to the true intent of the parties. See Borden v. Gulf Sates Utilities, 543 So.2d 924 (La.App. 1st Cir. 1989), writ denied, 545 So.2d 1041 (La. 1989).

Whether a contract is ambiguous or not is a question of law. Where factual findings are pertinent to the interpretation of the contract, those factual findings are not to be disturbed unless manifest error is shown. However, when appellate review is not premised upon any factual findings made at the

trial level, but is, instead, based upon an independent review and examination of the contract on its face, the manifest error rule does not apply. In such cases, appellate review of questions of law is simply whether the trial court was legally correct or legally incorrect. See Borden, Inc., supra, and authority cited therein.

The Contract

The pertinent provisions of the contract are as follows:

> Whereas, ABC is willing to request that the ABC Application be dismissed, and to provide consulting service to BCBC in the preparation of public affairs programming in return for: payment to it of Twenty-Five Thousand Dollars and the provision to it of program time for public affairs programming....
>
> ...
>
> 1. Covenants by ABC. ABC agrees to request that the ABC Application be dismissed with prejudice, to take any and all steps reasonably necessary to dismiss that application upon approval of this Agreement and related materials by the Commission or its delegatee, and to provide consulting service to BCBC in the preparation of public affairs programming.
>
> ....
>
> (v) The Programming to be broadcast during the ABC access time shall not be libelous, obscene or indecent. It will not in any other way violate any other rule or policy of the FCC or any other laws.
>
> ....
>
> Pursuant to its duties as permittee and/or licensee, BCBC reserves the right to refuse, in its sole discretion, to broadcast any portion of that

programming which violates any rule or regulation of the FCC or other law or its public interest obligations as a licensee.

(Contract at pp. 1-2; 2, 5-6; and 6.)

The Program

ABC submitted a 90-minute program, divided into three segment, entitled "Winds of Change" to be aired as public affairs programming pursuant to the contract. A review of the transcript of "Winds of Change" reveals the following:

The first part was about a group of activists known as "Association of community Organizations for Reform Now (ACORN)." A brief history of the group and how it was founded was presented. It also highlighted some of the accomplishments of ACORN, such as tougher penalties for rapists, closing crack houses in Arkansas, and challenging the route of the Wilbur Mills Freeway.

The overall tone of Part I consisted of people praising the organizations and plans for its continued growth. The segment described how ACORN centers it work around low income neighborhoods. A review of the transcript reveals appeals by ACORN members, which can be viewed as recruitment: "We're going to have more radio activity, so that we can be hears and be seen." Also "There ought to be more Acorn members in every city, in order to get the job done."

Part I also described ACORN's squatting program, which consists of moving low income people into homes taken over as a result of the Savings & Loan (S&L) debacle. (These people do not go through government screenings, but, rather, force their way into the home.) ACORN members rationalize this as the people's just rewards for paying for the S&L crisis.

Finally, Part I. winds up by espousing the future of

ACORN, which is to branch out politically. It ends with ACORN members describing how they were recruiting into the group (which basically is that they were told all about the goals and the good deeds of ACORN,w which is exactly which this segment does).

Part II of "Winds of Change" opens by describing Baton Rouge as a "hot bed of union organizing." This segment is aimed at the organizational efforts of Local 100, Service Employees International Union AFL/CIO (Local 100). This segment contains a blatant appeal to service workers to join a union and entices them to do so by describing what wonderful benefits there are and the security of belonging to a union. This segment also includes clips on union activities sin Hawaii, Maine, and the Greyhound bus strike. A telephone number is given out for further information.

Part III returns to the ACORN Group. This segment mainly deals with ACORN's squatting efforts. The fact squatting is illegal is mentioned, but the message of Part III is that the low income people must confront government bureaucracy, whether through legal or illegal mans.

Action of the Trial Court

The trial court found "Winds of Change" was a program produced and designed as a means of political solicitation and advertisement for ACORN and Local 100 an was not public affairs programming. This is a factual determination. As stated before, where factual findings are pertinent to the interpretation of a contract, those findings are not to be disturbed unless manifest error is shown. See Borden v. Gulf State Utilities, supra.

Appellate review of the factual findings of the trial court is not completed by reading so much of the record as will reveal a reasonable factual basis for the finding in the trial court; there must be a further determination that the record establishes that

the findings are not clearly wrong (manifestly erroneous). See Arceneaux v. Domingue, 365 So.2d 1330 (La. 1978).

We agree with the finding of the trial court that "Winds of Change" was a not public affairs programming. According to appellant, public affairs programming is defined as local self-expression, politics, service to minority groups, speeches, discussions, documentaries, vignettes, extended coverage of public events, free speech messages, and controversial issues. Syracuse Peace Council, 2 FCCRcd 5043; 1985 Fairness Report, 102 FCC2d 143 (1985); Deregulation of Radio, 84 FCC2d 968 (1984); Community Service Programming Category, 82 FCC2d 130 (1982); 47 CFR 73.1810(d)(1)(iv) (1983).[1]

Appellant submits this program contained all of the above and therefore should be considered "public affairs programming."

We disagree. The trial court found the program to be an advertisement and solicitation for ACORN and Local 100. We agree with the finding of the trial court that the segment produced by appellant was undoubtedly an enticement to join ACORN and Local 100. We cannot say the trial court was clearly wrong in finding "Winds of Change" was not public affairs programming since it was a solicitation. All the examples cited by appellant as public affairs programming all have the element of informativeness in them; however, they do not possess the element of solicitation. It is the element of solicitation contained in "Winds of Change" that is outside the realm of public affairs programming.

The trial court went on to find that Coastal

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[1]. Taking appellant's position of public affairs programming at face value, the trial court was still correct in determining that "Winds of Change" was not consistent with their definition of public affairs programming.

Broadcasting, Inc. (Coastal) had a duty to insure that all programming submitted to it by ABC was consistent with public interest. The trial court believes Coastal had broad latitude to determine whether the programming supplied to it was in the public interest.

We agree, based on the following provision in the contract between ABC and Coastal: "Pursuant to its duties as permittee and/or licensee, BCBC reserves the right to refuse, in its sole discretion, to broadcast any portion of that programming which violates any rule or regulation of the FCC or other law or its public interest obligations as a licensee."

Our review of the "Winds of Change" transcript reveals the program encouraged the practice of squatting. As already discussed and admitted in the program, this is an illegal activity, which amounts to trespassing. WE agree with the trial court that Coastal was within its discretion to refuse to broadcast the program.[2]

For the reasons assigned, the trial court's judgment is hereby affirmed. All costs of this appeal are to be assessed against the appellant.

**AFFIRMED**

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[2]. ABC was aware of this "sole discretion" provision. Giving the contract is the law between the parties, we do not find ABC has an constitutional challenges. Coastal is merely exercising the discretion granted to it by the contract.

**TWENTY-FOURTH JUDICIAL DISTRICT COURT**

**PARISH OF JEFFERSON**

**STATE OF LOUISIANA**

**NO. 421-952 DIVISION "K"**

**AREA BELLE CHASSE COMMUNITY RADIO**

**VERSUS**

**BELLE CHASSE BROADCASTING CORPORATION, ET AL.**

**FILED: 9-10-93** _____

**DEPUTY CLERK**

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**JUDGMENT**

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This matter came before the Court on a petition for injunctive relief, damages and attorney's fees filed on behalf of Area Belle Chasse Community Radio (ABC). ABC alleged that Coastal Broadcasting breached a contract or settlement agreement between it and Coastal Broadcasting when Coastal Broadcasting refused to air certain programming on its radio station that was produced by ABC.

In response to ABC's suit, Coastal Broadcasting filed its answer with Affirmative Defenses and Reconventional

Demand. Essentially, Coastal Broadcasting argues that pursuant to the settlement agreement with ABC, ABC was to produce public affairs programming; Coastal submits that the program produced by ABC was not public affairs programming. Coastal seeks a declaration that ABC breached the agreement, damages, and attorney's fees.

The salient facts are as follows: ABC and First Belle Chasse Media Group (which eventually became designated as Coastal Broadcasting, Inc.) were competitor applicants for the Belle Chasse station that is now KMEZ (FM). On March 6, 1989, these applicants executed a settlement agreement by which ABC's application would be dismissed and that of Coastal Broadcasting, Inc. would be granted. Subsequently, and pursuant to Federal Communication Commission approval, the station's license was assigned to Coastal.

Under the settlement agreement, Coastal paid $25,000.00 in monetary consideration to ABC. As further consideration for ABC's dismissal of its application, Coastal agreed to broadcast one and one half hours weekly of public affairs programming produced by ABC.

The real issue before the Court is whether the program "Winds of Change" submitted by ABC to Coastal Broadcasting, Inc. as public affairs programming is in fact public affairs programming. This Court thinks not.

After a careful refuse of the transcript of "Winds of Change" the Court believes that the programming as produced and designed as a means of political solicitation and advertisement for Acorn, and its affiliate, local 100, of the Service Employees International Union, AFL-CIO, and was not public affairs programming. the Court believes Coastal Broadcasting, Inc. had a duty to ensure that all programming submitted to it by Area Belle Chasse was consistent with the public interest. Furthermore, the Court believes that Coastal had broad latitude of choice to determine whether the

programming supplied to it was in the public interest. Therefore, the Court believes that Coastal Broadcasting, Inc. was justified in not airing the "Winds of Change."

The Court finds that Area Belle Chasse breached the agreement dated March 6, 1989 in that it failed to submit public affairs programming. With respect to the reconventional demand filed on behalf of Coastal Broadcasting, Inc. the Court declines to dissolve the entire contract executed by the parties for the reason that the $25,000.00 paid by Coastal Broadcasting, Inc. to ABC was in consideration for ABC's dismissing its application for the radio station license. To judicially dissolve the contract in its entirety would be in this Court's opinion, to place the parties in the positions they occupied prior to the FCC license being awarded, which would be to place them once again in competition for the license.

The Court also declines to award Coastal Broadcasting, Inc. any out of pocket moneies it expended to produce its own public affairs programming in lieu of ABC's programming for the reason that no evidence was produced at trial to substantiate any monies expended by Coastal to produce its own public affairs programming.

Finally, the Court believes some award of attorney's fees are in order since the Court finds that ABC has breached its contract with Coastal Broadcasting, Inc. The Court awards Coastal Broadcasting, Inc. $2,500.00 in attorney's fees and all costs of court.

READ, RENDERED AND SIGNED at Gretna, Louisiana, on this 10th day of September, 1993.

Martha E. Sassone, JUDGE